IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. .....

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FLOAT-AWAY DOOR COMPANY, and NATIONAL SURETY CORPORATION,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTION PRESENTED.

Does the decision of the United States Court of Appeals for the Fifth Circuit in the case *sub judice* conflict with Georgia law?

STATEMENT OF THE CASE.

Respondents accept the statement of how this case arose as set out in the Petition for Certiorari; however, respondents dispute petitioner's conclusion in its Statement of

the case that the injured claimant, Mr. Barrett, was an employee of an insured (pp. 6-7, Petition for Certiorari).

Float-Away loaded the Dance trailer on September 12, 1961, at its plant in Atlanta, Georgia. Mr. Barrett was injured on September 16, 1967, at the Universal Plant in Camden, Ohio. Mr. Barrett's injuries were caused (i. e. arose out of) Float-Away's negligence in loading the trailer—not out of any negligence in unloading the trailer (R. 59-71).

Float-Away and National Surety, respondents herein, contended in the Courts below that Float-Away became an insured under Continental's policy when it loaded the trailer, and that the policy extended coverage to the claims made by Mr. Barrett because Mr. Barrett's injuries **arose out of Float-Away's use (i. e. loading) of the trailer.**

Continental, petitioner herein, contended that there was no coverage under the policy because the injuries were sustained while the truck was being unloaded several days after Float-Away had completed its use (i. e. loading) of the trailer, its contention being that since Float-Away's use of the vehicle had ceased before the injuries were sustained, there was no coverage.

Thus, the controlling issue presented to the Court of Appeals was whether the event of loading or the event of unloading was determinative of petitioner's liability under the policy. In Part I of its opinion of December 1, 1966 (Appendix A, pp. 10a-15a, Petition for Certiorari) the Court of Appeals rejected petitioner's contentions and held that petitioner's liability was to be determined by the event out of which the injuries arose—not the event which was occurring when the injuries were sustained.

That part of the Court of Appeals' decision has been accepted by petitioner by seeking a review only of that

part of the decision concerning the employee-workmen's compensation exclusions of the insurance policy (Last paragraph, p. 5, Petition for Certiorari).

REASONS FOR NOT GRANTING THE WRIT.

Petitioner's application for a Writ of Certiorari in this case is founded on one point only. That point is: The decision of the Court of Appeals for the Fifth Circuit is contrary to and in conflict with Georgia law, and, therefore violates the rule established by this Court in **Erie R. R. v. Tompkins**, 304 U. S. 64 (1938).

Respondents respectfully submit that the decision of the Court of Appeals is not in conflict with Georgia law, but is consistent with Georgia law, that the cases cited by petitioner are inapposite here, and that the Court of Appeals for the Fifth Circuit has not violated the **Erie** rule.

The two Georgia cases cited by petitioner, **Fireman's Fund Indemnity Co. v. Mosaic Tile Co., et al.**, 101 Ga. App. 701, 115 S. E. 2d 263 (1960), and **Nationwide Mutual Ins. Co. v. Peek, et al.**, Court of Appeals of Georgia No. 42,700, May 2, 1967, as being in conflict with and contrary to the Court of Appeals' decision in this case, are not controlling here. Neither of those cases involved factual situations similar to the situation here, nor were the holdings or pronouncements of the Georgia Court of Appeals dispositive of the issue here.

In the **Mosaic Tile Co.** case, *supra*, the injured claimant was an employee of the named insured, and was injured by the negligence of an omnibus insured. There was no question there that the employer of the injured claimant and the tortfeasor were both insured under the policy when the negligent act was committed. In the case *sub judice*, the employer of the injured claimant was **not** insured when the negligent act occurred, and as pointed

out above, it has already been established that petitioner's liability under its policy is to be determined when the negligence occurred—not when the injury was sustained. Therefore, when petitioner's liability in this case arose (which was while Float-Away was loading the vehicle) the injured claimant's employer was not insured under the policy, and the exclusion asserted by petitioner was inapplicable. The mere fact that various persons later became insureds under the policy by virtue of their subsequent use of the vehicle had no effect on petitioner's liability as already established.

Further, the insurer in the **Mosaic Tile Co.** case was obligated to pay and had already paid workmen's compensation benefits to the injured employee. The specific purpose of such employee-workmen's compensation exclusions as asserted here by petitioner is to avoid such double liability. Petitioner in this case has no such employee or workmen's compensation liability, and the decision of the Court of Appeals for the Fifth Circuit is entirely in accord with the decision of the Georgia Court of Appeals in the **Mosaic Tile Co.** case.

Further, even if the employee-workmen's compensation exclusion were applicable in this case, the **Mosaic Tile** case does not require a reversal of the Court of Appeals for the Fifth Circuit. The language of the Georgia Court of Appeals regarding this question is as follows:

> "To repeat, the policy defines the word 'insured' as follows: 'With respect to the insurance for bodily injury liability . . : the **unqualified word "insured"** includes the named insured and . . . also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the name insured or with the permission . . .' of the named insured. This definition is broad enough

to include, and clearly does include, both the named insured and all additional insureds" (Emphasis added). 101 Ga. App. at 704.

The policy under consideration here uses three different and distinct terms in referring to who has insurance under the policy:

(1) "the named insured",

(2) "the insured", and

(3) "insured", without any qualification.

In this case the Court is not concerned with construing the unqualified term "insured," but is concerned with construing the qualified term "the insured." Whether the term "the insured" in the **Mosaic Tile Co.** case would have been regarded as synonymous with the unqualified term "insured" is unknown, as no such issue was before the Court there, and the Court did not state an opinion as to the meaning of "the insured" as compared with "insured."

The second case cited by petitioner, **Nationwide Mutual Ins. Co. v. Peek**, et al., Georgia Court of Appeals, No. 42700, May 2, 1967, is also unlike the case at bar. The **Peek** case involved a claim for property damage to a truck which was sustained in a collision with another truck. Both trucks had been leased to the named insured, and were therefore covered by the policy. Also, the owners of the trucks (the claimant and the tortfeasor) were insured under the same policy because they were operating the trucks with the consent of the named insured. The policy contained an exclusion which stated that the "policy does not apply to injury to . . . property rented to . . . the insured . . ." (Appendix F, p. 382, Petition for Certiorari).

Again, as in the **Mosaic Tile Co.** case, *supra*, it was admitted that the claimant (owner of the damaged truck)

and the tort-feasor were both insured under the same insurance policy when the negligent event occurred. No such situation exists in the case at bar. Further, the type of policy, the coverage extended under the policy, and the exclusion of the policy at issue in the **Peek** case were entirely different from the type of policy, the coverage extended, and the exclusion involved here. Therefore, even had the Georgia Court of Appeals' decision in the **Peek** case (which was a case of first impression in Georgia according to the Court) existed when the Court of Appeals for the Fifth Circuit rendered its decision in this case, no different decision would have been required.

Only two cases have been discovered which are analogous to this case. Those cases are **Gulf Insurance Co. v. Mack Warehouse Corp.**, 212 F. Supp. 39 (E. D. Pa. 1962), and **Panhandle Gravel Co. v. Wilson**, 248 S. W. 2d 779 (Tex. Civ. App.). Both of those decisions are in accord with the decision of the Court of Appeals for the Fifth Circuit in this case. No other cases in point from any jurisdiction, including Georgia, have been discovered by respondents and petitioner has cited none.

CONCLUSION.

The decisions rendered by the Court of Appeals for the Fifth Circuit in this case were based on a construction of petitioner's insurance policy in the light of the only two analogous cases existing. There has been no change in the law on the point at issue since. The decision of the Georgia Court of Appeals in **Nationwide Mutual Ins. Co. v. Peek et al.**, *supra*, concerned questions so foreign to those at issue in this case that it is totally without influence or guidance to a Court concerned with the issues here.

We respectfully submit that no valid reason exists for granting the Writ of Certiorari in this case or for other-

wise prolonging this litigation, and we respectfully urge this Court to deny the petition.

Respectfully submitted,

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